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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 222

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

against

BENNE KATZ, ALFRED FINKEL and MURRAY KATZ, d/b/a WILLIAMSBURG STEEL PRODUCTS COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION

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Dated: New York, New York,
August 25, 1961.

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Opinions Below

The decision of the Court of Appeals is reported in 289 F. (2) 700 (No. 5, July 3, 1961).

Statutes Involved

The relevant portions of the N.L.R.A. and of the Judicial Code are set forth in the Appendix, *infra*, pages 21-22.

Respondents' Grounds of Opposition

1. This Court is without jurisdiction to grant certiorari because of the *non-final nature of the judgment of the Court of Appeals* (App. B, Petition, pp. 42, 43) which denied enforcement of the order of the Board, but remanded the action to the Board ". . . for further proceedings consistent with the opinion of this Court. . . ."

2. There is no direct and irreconcilable conflict between the Court of Appeals and decisions in other circuits on the sole question presented by petitioner (Petition, p. 2).

3. If conflict existed on such question, it had been resolved by this Court in *N.L.R.B.* v. *Insurance Agents International Union*, 361 U. S. 477, decided February 23rd, 1960, prior to the Board's petition for enforcement.

4. The Court of Appeals expressly followed and applied the doctrine of *Insurance Agents Union*.

5. No valid grounds have been shown by petitioner to justify granting certiorari.

ARGUMENT

POINT I

The non-final nature of the judgment of the Court of Appeals precludes granting of certiorari.

1. We assert the absence of jurisdiction in this Court as the first ground of opposition. If it is determined that the judgment here is not a *final* one, the substantive question posed by petitioner (Petition, p. 2) need not be reached or passed on by this Court, and the petition should be denied.

2. If we relied solely on the concluding language of the ordering paragraph following the denial of enforcement (App. B., Petition, p. 43), viz. ". . . and that the action be and it hereby is remanded to the National Labor Relations Board for further proceedings consistent with the opinion of this Court . . .", the *non-final* nature of the judgment could be assumed. But its *non-final, non-determinative* nature is conclusively established by the opinion itself (App. B., Petition, pp. 17-42).

3. The Board found violations, (i), under Sec. 8(a)(5) and (ii), under 8(a)(1) of the Act. Now the remand is the logical and practical implementation of the Court of Appeals' analysis of the Board's finding of an unfair labor practice allegedly committed by the respondents, which, as the Court stated (App. B., Petition, p. 33), ". . . . impliedly proceeds from an erroneous view (of the Board) *that specific unilateral acts, regardless of bad faith, may constitute violations of Sec. 8(a)(5)* . . ." (emphasis supplied). Accordingly, the Court directed that ". . . the case should be remanded to the Board in order that it may have an opportunity *to take additional evidence,* and make such findings as may be warranted by the record" (emphasis supplied) (p. 33).

As to the Board's finding under (ii) above, the Court concluded (p. 34):

> ". . . As discussed previously, the Board found Employer's unilateral acts violative of the two sections but rejected the examiner's finding that Employer did not bargain in good faith. However, the Board's order, set out herein, was directed exclusively to the refusal to bargain. This history leads us to believe that the complaint was based upon an alleged Sec. 8(a)(5) refusal to bargain, *that the alleged Sec. 8(a)(1) violations are derivative only, and that the finding that Sec. 8(a)(1) has been violated must be reviewed in*

the light of the review we have ordered the Board to make with respect to its finding that Sec. 8(a)(5) was violated." (Emphasis supplied)

4. Before proceeding to a review of the legislative history and the evolution of decisional law in this Court (App. B., Petition, pp. 21-32) which led to the rejection of the doctrine of "per se" violations of Sec. 8(a)(5) (refusal to bargain) attributed to specific unilateral acts, *in the absence of the necessary Board finding that the employer failed to act in good faith* (*Insurance Agents International Union*, 361 U. S. 477), the Court first announced its conclusions as follows:

> "We are of the opinion that the unilateral acts here complained of, occurring as they did during the negotiating of a collective bargaining agreement, do not *per se* constitute a refusal to bargain collectively and *per se* are not violative of Sec. 8(a)(5). While the subject is not generally free from doubt, it is our conclusion *that in the posture of this case, a necessary requisite of a Sec. 8(a)(5) violation is a finding that the employer failed to bargain in good faith.* Moreover, we conclude that here the Sec. 8(a)(1) violations the Board has found derived from the acts found to have violated Sec. 8(a)(5), *and that these violations also are unproved, without the necessary finding that the employer failed to act in good faith . . .*" (App. B., Petition, p. 21) (Emphasis supplied)

5. The Court held that in order to sustain its finding of a Sec. 8(a)(5) violation, the Board should be required to show that its determination of failure to bargain in good faith "... must rest ... upon a subjective evaluation of the employer's attitude", and that "This evaluation can only be effectively made in terms of the complete bargaining situation . . ." (p. 22). Indicating the need for additional evidence in this case (in order to avoid relying on

mere inference of failure to bargain in good faith from the fact of a unilateral change and the consequent finding of a Sec. 8(a)(5) violation), the Court stated (p. 30):

> "The evidence must be tested within the framework of the entire bargaining situation. *An opportunity must be given the employer to rebut the inference and finally there must be a definite determination* of the mental attitude of the employer. The language of the Supreme Court indicates that beginning with *Crompton* and concluding with *Insurance Agents' Union*, the above described approach is the correct one . . ."

But the Court properly declined the task of testing for itself the "inference arising from Employer's unilateral acts in a petition for enforcement . . .", and asked itself whether it ". . . must remand to the National Labor Relations Board *for its initial determination of this issue . . .*" (emphasis supplied).

The Court further wrote (p. 31):

> ". . . In all the Supreme Court cases that we have discussed in which the Board's order was enforced there had been a Board finding that the respondent-employer had *failed to bargain in good faith . . .*" and ". . . Here the Board explicitly declined to do so . . ."

The Court concluded (relying on the dispositive determination of this Court in *Insurance Agents Union, supra*, striking down the Board's finding of a *per se* violation, and ruling that the ". . . Board must find the ultimate fact. . . ." of failure to bargain in "good faith"), that (p. 33) ". . . *the case should be remanded to the Board* in order that it may have an *opportunity to take additional evidence* and make such findings as may be warranted by the record . . ."

6. Thus, it is hardly open to debate that the Court of Appeals concluded that it had been *confronted with, indeed,*

had been considering an incompleted case, and felt impelled to remand it to the Board for *additional evidence* along the lines indicated, if the Board wished to justify findings of Sec. 8(a)(5) and Sec. 8(a)(1) violations by respondents.

In these circumstances, the judgment (App. B., Petition, pp. 42, 44) remanding the case, can scarcely be denominated (not to speak of, *treated,* as the Board by implication would seem to be doing here), as a *"final judgment"*, appealable to this Court. It is significant that the Board's petition nowhere adverts to the plainly *interlocutory* nature of the judgment. We find it difficult to understand this silence on the Board's part regarding this elementary feature of the requisites for certiorari.

The Board (Petition, p. 10) asks for review here of an issue which it chooses to characterize as "continually arising", on which it claims there exists a "conflict of circuits." *It asserts in conclusory fashion that the* holding of the Court below, is "contrary to the principles which are implicit in prior decisions of this Court."

Respondents, on the other hand, respectfully suggest that the judgment here is not a "final" one, that the Board's petition is therefore premature, and on this ground alone must be denied.

7. We have, therefore, no choice but to urge the redundant doctrine that only *final judgments* are appealable in this Court, as the necessary doctrine to be applied here, and requiring dismissal of the petition.

8. The Board invokes the jurisdiction of this Court under 28 U.S.C. 1254(1) and 29 U.S.C. 160(e) (Petition, p. 2).

(a) 28 U.S.C. 1254(1) permits review by this Court, in certiorari, of cases in the Courts of Appeals ". . . before or after rendition of judgment or decree."

(b) 29 U.S.C. 160(e) prescribes the procedure and the proceedings in the Court of Appeals relating to a petition of the Board for enforcement of its order. The last paragraph of 160(e) reads, in relevant part: ". . . Upon the filing of the record with it, the jurisdiction of the Court shall be exclusive and its *judgment and decree shall be final,* except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari or certification as provided in Section 1254 of Title 28."

(c) Judging from the bare assertion by the Board of jurisdiction in this Court, based on the above two sections, and by the absence (or perhaps, conscious avoidance, in its petition of any recognition of the existence here of any jurisdictional question), we are entitled to conclude that the Board *merely has assumed* that, in fact and in law there is no such question here, i.e., that the judgment challenged by the Board is a "final" one. The Board evidently is of the opinion that this Court would (in the light of the seemingly plain language of these sections) consider its jurisdiction of this case to be undisputed, and, in its deliberations on the Board's petition, pass immediately to a consideration of the merits of the sole question presented by the Board (Petition, p. 2).

(d) The respondent's position, to the contrary, is that there does exist here, a serious question as to whether, *in the present posture of the case now before the Court of Appeals,* and in the light of its opinion and judgment (App. B., Petition, pp. 17-43), this Court does have jurisdiction.

We respectfully urge, in short, that in the light of the unquestioned applicability here of the elementary doctrine of "appealable finality", *the judgment here, is not by any criteria or standards, a "final" one, but is on its face as well as in its judicial and administrative effect, an interlocutory one. Accordingly, this Court may not take jurisdiction, but must deny certiorari.*

To grant certiorari in this case, would be to disregard, without any showing of overriding necessity therefor, one of the most firmly established doctrines of this Court.

(e) "Finality" of the judgment here, we respectfully suggest, is not to be so easily assumed *without more*, merely because (a) The determination of the Court of Appeals (App. B., Petition, p. 42) is captioned "Judgment", or (b) 28 U.S.C. 1254(1) permits review by this Court of a "judgment or decree", and least of all, merely because (c) 29 U.S.C. 160(e) states that "upon filing of the record with it, the jurisdiction of the Court of Appeals shall be exclusive, *and its judgment and decree shall be final*, except that the same . . . etc."

If, in our testing of this preliminary jurisdictional question, we were to rely solely on the language of these sections for guidance in determining the "finality" or "non-finality" of the judgment here, we would not, in the slightest, be helped. Nowhere in these sections is "finality" or "non-finality" described or defined. If, therefore, the doctrine of "appealable finality" is not to be disregarded and is to be given significant application here, we must assume that the types of "judgments" or "decrees" intended by Congress to be appealable here, under the above-noted sections, are solely "final" ones (as they are required to be for State Court judgments, *Burns* v. *State of Ohio*, 360 U. S. 252; unless, as in other situations, the statute *expressly permits* appeals to this Court from *interlocutory* judgments, decrees or orders. As to "the record" to be filed, we are likewise entitled to assume that Congress intended this to be a "final", and "completed" record and not one subject to "further proceedings" on a remand to the Board.

But we look to the *decisional law of this Court* for guidance in determining whether the judgment here, is in practical, as well as judicial and administrative effect, a "final" one.

We shall attempt to demonstrate that, in the light of the applicable case law of this Court, on the point, the conclusion is unavoidable that the judgment here is *interlocutory, non-final,* and *non-appealable,* at this stage of the proceedings.

(f) The Board, under the remand of the Court (its enforcement petition having been denied), is required to take "further proceedings consistent with the opinion of the Court." If the Board determines not to take such "further proceedings", the matter would be presumably closed, and the enforcement denial remain on the docket as representing the final outcome. Respondents submit that the Board *has been premature in its petition here,* and if this Court *denies certiorari,* there will be time enough for the Board to file a later petition for certiorari, if so advised, *only after the supplementary record the Board has made* (following such "further proceedings"), *completes the record* now filed with the Court of Appeals. This, we submit, will terminate all the proceedings and the Board may, *at that time, renew its appeal* to the Court of Appeals on such *completed, final record,* and thereafter await a *final* and *complete* disposition of all the issues by that Court. If the Board's enforcement petition is *finally* and *completely* denied and a *truly final* judgment is entered by the Court, and the Board, *thereafter,* files here its petition for certiorari, it unquestionably would then be properly requesting this Court to review a "final" judgment. No possible objection could then be raised as to that judgment's "appealable finality."

(g) But respondents must strenuously object to the Board's attempt to jump the gun and obtain a review from this Court on the merits of an issue, *before that issue is definitively and finally disposed of by the Court of Appeals.* It can hardly be disputed that, in the present posture of the case, the record presented by the Board to the Court has not been completed. It is entirely possible that,

upon such *completed record*, and a further appeal by the Board to the Court of Appeals, that Court may hold that the Board has *produced enough additional evidence to justify and to grant its enforcement petition.* But respondents must insist that the Board should not be allowed to hurdle or by-pass the normal and elementary requirement (as it is plainly attempting to do by this petition) of presenting a "final judgment" to this Court for review.

9. The judgment here did not dispose of all the issues; indeed, pending further proceedings by the Board, it expressly suspended judgment on the major issue presented. In these circumstances, this Court has held that a decree remanding a cause for further proceedings is manifestly not a "final" decree. *Slaker v. O'Connor*, 278 U. S. 188. Such a decree does not have the finality* and completeness necessary for the purpose of an appeal to this Court. *Martinez* v. *Int'l Banking Corp.*, 220 U. S. 214, 223; *Collins* v. *Miller*, 252 U. S. 364. Viewed as an *order* to remand, the judgment of the Court of Appeals cannot be deemed a "final" judgment. *Richmond & D. R. Co.* v. *Thouron*, 134 U. S. 45. It failed to dispose of all the issues. It is but a step forward towards "further proceedings" by the Board, i.e., final hearings, and a final judgment which will dispose of the entire controversy. Until this is completed, a truly final judgment cannot be entered in this case. Further, we call the Court's attention to the fact that the judgment entered on April 11, 1961 (App. B., Petition, p. 42) is captioned, not "Final Judgment", but merely "Judgment." Concededly, a mere label, without regard to the content and effect of the document, does not deter-

* We shall not burden this Court by engaging in the ancient and interminable controversy over the limits and appropriate contents, for appeals purposes, of the "finality" concept (*Baltimore Contractors* v. *Bodinger*, 348 U. S. 176, 178, n. 4). We submit that the unmistakable *interlocutory* nature of the judgment here makes unnecessary any further discussion of exceptions, qualifications, or refinements of "finality."

mine its true nature. We do contend, however, that it is proper to read into the caption "Judgment", the clarifying designation of "Interlocutory Judgment" (*F.T.C.* v. *Minneapolis Honeywell R. Co.*, 344 U. S. 206, 209).* And nothing is clearer, we submit, than that such a judgment is not appealable to this Court (unless expressly permitted by Statute). If it were, not only labor, but all types of controversies could be brought to this Court *in fragments by successive appeals*, for it is elementary that the right of appeal is postponed until there is a final decree disposing of the whole case. *Rexford* v. *Brunswick Balke Co.*, 228 U. S. 339, and cases cited at page 346.

10. Remand means simply that the case is returned to the administrative body in order that it may take further action *in accordance with the applicable law. Fed. Radio Comm.* v. *Nelson*, 289 U. S. 266. *And in the case here, the applicable law is the doctrine relating to "per se" violations, as pronounced by this Court in Insurance Agents Union, supra.*

Such a remand does not dismiss or terminate the administrative proceedings. If findings are lacking which may properly be made upon the evidence already received, the Court does not require the evidence to be reheard. If further evidence is necessary and available to supply the basis for findings on material points, that evidence may be taken. Whatever findings or order may subsequently be made will be subject to challenge if not adequately supported or the Board has failed to act in accordance with the statutory requirements (*Ford* v. *N.L.R.B.*, 305 U. S. 364).

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* It is difficult to believe that there can be here any such "vagueness" or puzzlement on the part of the Board as to the "finality" (or lack of finality), of the judgment of the Court of Appeals as was inveighed against by Mr. Justice Black (dissenting) in *F.T.C.* v. *Minneapolis-Honeywell R. Co.*, 344 U. S. 206, 217.

11. The Board's petition is wholly silent as to the burden which surely rests upon it to show that it has met the test as laid down by this Court in *Dickinson* v. *Petroleum Conv. Corp.*, 338 U. S. 507, 513, 514, that to justify appealability, it must be established that the decree in question is not "tentative, informal nor incomplete." We submit that the judgment here (while it may lack "informality" by reason of its conventional *format*), plainly is "tentative" and "incomplete"—it leaves open and undecided major issues of fact, and remands it to the Board "for further proceedings consistent with the opinion" of the Court. Indeed, on such remand, as was stated in *U. S.* v. *U. S. Smelting R & M Co.*, 339 U. S. 186, 198, ". . . nothing was finally decided. The whole proceeding thereafter was *in fieri*. The Commission had a right on reconsideration to make a new record. *Ford Motor Co.* v. *N.L.R.B.*, 305 U. S. 364, 374, 375 . . ."

". . . So long as the matter remains open, unfinished and incomplete, there may be no intrusion by appeal . . . Nor does the statute permit appeals even from fully consummated decision, where they are but steps towards final judgment in which they will merge. The purpose is to continue in one review all stages of the proceeding that may effectively be reviewed and corrected if and when final judgment results. . . ." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546.

Congress has long expressed a policy against piecemeal appeals (*Baltimore Contractors* v. *Bodinger*, 348 U. S. 176, 178), and the purpose of the finality requirement is to "avoid piecemeal disposition of the basic controversy in a single case, 'where the result of review will be to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation . . .' " *Cobbledick* v. *U. S.*, 309 U. S. 323, 326; *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 123-127; *Stack* v. *Boyle*, 342 U. S. 1, 12. In general, a "judgment"

or decision is final for the purpose of appeal only "when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." *St. Louis I. M. & S. R. Co.* v. *Southern Express Co.*, 108 U. S. 24, 28. This rule applies in criminal as well as civil cases. *Berman* v. *U. S.*, 302 U. S. 211; *Parr* v. *U. S.*, 351 U. S. 513, 518. The principle against piecemeal appeals implies that the whole of a litigation must be completed before any appeal is allowed. *Collins* v. *Miller*, 252 U. S. 364, 370. And even "exceptions" to the principle against piecemeal appeals have made no inroads on the principle as such, since they have not qualified its core, that is, there should be no premature intermediate appeal. *Sears Roebuck & Co.* v. *Mackey*, 351 U. S. 427, 441.

12. When the Court of Appeals remanded the case to the Board for further proceedings, surely it must be conceded that this was done with a view to requiring the Board to give full effect to its duties in harmony with the views the Court had expressed. *Ford Motor Co.* v. *N.L.R.B.*, *supra*, 374. Indeed, after the remand was made, the Board *was bound to deal with the issue remanded afresh*, thus performing the function delegated to it by Congress. Only in that way could the legislative policies embodied in the N.L.R.B. be effectuated. *N.L.R.B.* v. *Donnelly Co.*, 330 U. S. 219, 227, 228; *S.E.C.* v. *Chenery Corp.*, 332 U. S. 194, 201.

13. The judgment of the Court of Appeals was not "final by any relevant standard" (*Chicago* v. *Atchison, Topeka & Santa Fe R. Co.*, 357 U. S. 77, at p. 83). Indeed, the judgment here is at the opposite pole from the one which this Court held to be "final" (construing 28 U.S.C. 1254(2)), in *Chicago, supra*, at page 83, viz.: ". . . By its decision the Court of Appeals resolved all disputed questions between the parties . . . there was nothing more to litigate; all that remained for the District Court on remand

was to formally enter judgment for the plaintiff. Compare *Pope* v. *Atlantic Coast Line R. Co.*, 345 U. S. 379, 381-383, 97 L. Ed. 1094, 1098, 73 S. Ct. 749 . . ."

14. Not only is it erroneous (as the Board seems, by implication, to be doing in filing this petition) to treat or describe the judgment here as "final", but the remand positively *precludes* the entry of "final judgment." The Court of Appeals followed standard procedure which for years has been the pattern for the handling of "interlocutory" decisions (or "judgments"), such as the one here. Merely as illustration, the Second Circuit itself, in *N.L.R.B.* v. *Acme Air Appliance Co.* (2d Cir.), 117 F. (2) 417 (1941), *before entering a final decree* either affirming, modifying or setting aside the Board's order (in a case involving alleged unfair practices under the original Sections of the National Labor Relations Act, 29 U.S.C. Secs. 157 and 158(1) and (8)), remanded the order to the Board "for further proceedings." The Court concluded, on page 423, and wrote: "When the Board shall issue an order *as a result of such proceedings*, such order shall be made a supplemental part of the pending record for our *final action and decree*. *N.L.R.B.* v. *Somerset Shoe Co.* (1 Cir.), 111 F. (2) 681, 690; *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 372, 373, 59 S. Ct. 301, 83 L. Ed. 221. An enforcement order may enter in accordance with the foregoing . . ." (emphasis supplied). (See also, *Fleming* v. *F.C.C.*, 225 F. (2) 523, D. C. Cir. (1955), at p. 526.)

15. The situation here is not the one found in *Int'l Union* v. *Eagle Picher M. & S. Co.*, 335 U. S. 339, at pages 340, 341, where the record had been made and was submitted for action by the Board. Speaking of the right of the Court of Appeals to remand a cause to the Board for the taking of further evidence and for further consideration, this Court went on to state, at page 339: ". . . But it is plain that the scheme of the Act contemplates that

when the record has been made and is finally submitted for action by the Board, the judgment 'shall be final.' It is to have the qualities of any other decree entered in a litigated cause *upon full hearing*, and is submitted subject to review by this Court on certiorari as in other cases. (Sec. 10(e), supra.) . . ." Continuing on page 341, this Court then wrote: ". . . But here the order was definite and complete; it contemplated only arithmetical computation. . . ."

16. As was recently stated by the 9th Circuit in *Resnik* v. *LaPaz Guest Ranch*, 289 F. (2) 814 (9th Cir.) (Apr. 12, 1961), at page 817: ". . . A decision which leaves some matter in controversy open for future consideration before the rights of the parties are conclusively adjudicated is interlocutory and not final . . ." And, as the same Circuit also stated, at page 20, in *N.L.R.B.* v. *Pacific Transport Lines Inc.*, 290 F. (2) 14 (Apr. 3, 1961) (in a case involving alleged violation of Secs. 8(a)(3) and 8(b)(2) of the Act), that while that Court "had accorded the Board's decision the deference it requires and deserves, *yet we are not bound to give it unwarranted finality . . .*" (emphasis supplied).

17. We suggest that to hold the judgment of the Court of Appeals as "final", would likewise be attributing to the Board's order in this case, an "unwarranted finality." Nor should this Court do so, if the rule it laid down in *Arnold* v. *U. S., etc.*, 263 U. S. 427, at page 434, as to the non-appealability of *non-final or non-definitive judgments*, is to be applied here: ". . . It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be receivable, a judgment or decree must be not only final but complete, that is final not only as to all the parties, but as to the whole subject matter and as to all the cause of action involved; and that if the judgment or decree be not thus final and complete, *the writ of error or appeal must be dismissed for want of jurisdiction* . . . (cases cited) . . ." (emphasis supplied).

POINT II

As to the sole question presented by the Board, the alleged "direct conflict" between the Second Court of Appeals and other Circuits was resolved by this Court in *N.L.R.B.* v. *Insurance Agents International Union*, 361 U. S. 477 (decided February 23, 1960), prior to the Board's filing petition for enforcement.

Even assuming, *arguendo*, that the judgment here is final and appealable, the petition presents no acceptable basis for review by this Court.

1. The Board submits as its first reason for granting the writ (Petition, p. 9) the "recognition" by the Court of Appeals (App. B., Petition, p. 32, n. 10) "that its holding* . . . is in *direct conflict with the decisions* of several other Courts of Appeal" (citing cases) (emphasis supplied).

2. We may observe, in passing, that the Court prefaced its marginal note (p. 32, n. 10) listing these decisions, by the comment "For decisions *disagreeing with the result reached herein* . . ." (emphasis supplied). Thus it is, at the very least, inaccurate for the Board to characterize this language as a "recognition" by the Court that its holding ". . . is in direct conflict with the decisions of several courts of appeal. . . ."

3. We are not favored by the Board's analysis of these other decisions. We are not shown in what specific respects in each of such decisions, such conflict is a real one

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* I.e., that an employer does not violate his bargaining obligation under the Act, where he makes changes in wages and other conditions of employment during negotiations and prior to an impasse without notifying or consulting the employees' bargaining agent, "absent a showing that he was motivated by bad faith."

and does in actual fact exist. Surely a *bare, conclusory assertion* of the existence of such a "direct conflict", furnishes no basis for the grant of certiorari on that ground.

4. We submit that on a careful reading and fair appraisal of the holdings of the other circuits on the principle of the necessity of an *explicit finding* by the Board of lack of good faith of an employer to justify the *ultimate* finding of a violation of Sec. 8(a)(5), it will abundantly appear that the *"disagreements"* of these circuits with "the result" reached by the Second Court of Appeals here, stemmed not from a *"direct" conflict* on this principle but from its application to the varying factual contexts in the records in such other cases, which led to diverse findings of fact relating to the presence (or absence) of good faith on the part of an employer. We submit that a "disagreement with the result" is a far cry from a "direct, square and irreconcilable conflict." The Board's gratuitous equating of the two is hardly a sound basis, without more, for the grant of certiorari.

5. Concededly, this case is not completed. It has been remanded to the Board for "further proceedings." But the Board has failed to show, *that at this stage,* the judgment here, even though not final, is fundamental to the further conduct of the case, and therefore is an appropriate one for review by this Court. There has been no showing that there are unusual factors present justifying certiorari. Nor is the sole question presented by the Board of such importance that it could be fairly urged that its resolution by this Court *at this stage of the proceedings,* will have immediate impact far beyond the particular facts and parties involved. "... 'Special and important reasons' imply a reach for a problem beyond the academic or the episodic . . . " (*Rice* v. *Sioux City Cemetery,* 349 U. S. 70). In these circumstances alone, certiorari should be denied, *U. S.* v. *General Motors Corp.,* 323 U. S. 373, 377;

Land v. *Dollar*, 330 U. S. 731, 734; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682.

6. But even assuming that the "conflict" between the Second Circuit and the other circuits, as claimed by the Board (Petition, p. 10) did exist, the short answer to this contention is that such "conflict" was definitively resolved by this Court in *N.L.R.B.* v. *Insurance Agents Int'l Union, supra.* It may well be that, as the Board claims, "The issue continually arises" (Petition, p. 10), but in the light of the unequivocal disposition of the sole question here, by this Court in *Insurance Agents Int'l Union, supra* (decided Feb. 23, 1960), it is difficult to understand how at this date, there can be any "conflicts of the circuits."

7. The Court of Appeals made an exhaustive and penetrating exposition of the legislative and decisional history involved in the problem raised by the Board, and, we respectfully submit, correctly concluded (App. B., Petition, p. 30) that the language of this Court, indicates that, ". . . beginning with *Crompton* and concluding with *Insurance Agents' Union*, the above described approach is the correct one . . ."", i.e., " . . . an *inference* of failure to bargain in good faith and consequent finding of a violation of Sec. 8(a)(5), may not be made solely from the fact of unilateral change," and that "the evidence must be tested within the framework of the entire bargaining situatio An opportunity must first be given the employer to rebut the inference and finally there must be a *definite determination of the mental attitude of the employer. . . .*" And as to whether the Court of Appeals or the Board must determine the issue of drawing the inference of absence of good faith from an employer's unilateral acts, the Court further correctly concluded (p. 31), that this Court in *Insurance Agents Union* (per Frankfurter, J., concurring) ". . . disposed of this problem . . ." by holding that ". . . *The Board must find the ultimate fact . . .*" of absence or

presence of good faith. Thus the Court of Appeals had merely to follow and did in fact, *precisely* follow the guidelines laid down by this Court in *Insurance Agents Int'l Union*, which, by the time this case was heard, had definitely resolved any supposed "conflicts" among the circuits on the sole question presented by the Board.

8. It should not be overlooked, moreover, that all of the cases cited by the Board as in "direct conflict" with the holding of the Court of Appeals (Petition, pp. 9, 10) *antedate Insurance Agents Union*, which was decided February 23, 1960. Thus on the sole question here, there was no direct, or any other sort of conflict, when the case reached the Second Court of Appeals on November 15, 1960. That Court (Lumbard, Ch. J., dissenting) in its opinion dated April 11, 1961, after reviewing the record, made an extraordinarily perceptive analysis of the evolution of the position of this Court on the sole question here (App. B., Petition, pp. 21-29). It arrived at the conclusion (p. 21) that "in the posture of this case a necessary requisite of a Section 8(a)5 violation is a finding that the employer failed to bargain in good faith." It then wrote (pp. 29, 30). ". . . *N.L.R.B.* v. *Insurance Agents International Union*, supra, the Courts' most recent word supports our position. . . ."

9. In the light of such authoritative clarification by this Court, *prior* to the time the case at bar reached the Court of Appeals, and the correct application by that Court of the doctrine laid down in *Insurance Agents*, it is difficult to understand how the Board can make any claim that at this time there exists such a real and embarrassing conflict of opinion and authority between the circuit courts of appeal as would justify the grant of certiorari, *N.L.R.B.* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502; *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, 393; *Dick* v. *N. Y. Life Insurance Co.*, 359 U. S. 437, 449, 450;

Rule 19(1)(b), Revised Rules, Supreme Court of the United States.

10. A final observation is necessary. The petition *omits even mention* of the governing decision here, viz.: *N.L.R.B. v. Insurance Agents International Union, supra.* Presumably the Board believes that decision is so inapposite as not to deserve even the briefest comment—despite the repeated references to and manifest reliance upon it, by the Court of Appeals in its opinion (App. B., Petition, pp. 28, 29, 30, 31, 32). The Board, however, seems satisfied (Petition, p. 106) that "... the holding of the Court below is contrary to the *principles which are implicit in prior decisions of this Court* ..." (citing cases).

It is respondent's respectful suggestion that, to the contrary, *Insurance Agents makes explicit* a doctrine which not only fully supports the holding of the Court of Appeals, but has resolved and sets at rest any seeming "conflicts" of opinion of the Courts of Appeals.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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Dated, New York, August , 1961.

APPENDIX

N.L.R.A., as amended, 29 U.S.C. 151, *et seq.*:

"Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

. . . . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

Sec. 10(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively,

wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in Section 2112 of Title 28. . . .

Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinbefore provided, and by the Supreme Court of the United States upon Writ of certiorari of certification as provided in section 1254 of Title 28."

JUDICIAL CODE and JUDICIARY, as amended (28 U. S. 1251, *et seq.*):

"Section 1254(1).

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . ."